

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD R. GREEN)	
Claimant)	
VS.)	
)	Docket Nos. 253,915 & 253,916
KEY CONSTRUCTION, INC.)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the Nunc Pro Tunc Award of Administrative Law Judge John D. Clark dated June 29, 2004. The Workers Compensation Board (Board) heard oral argument on April 22, 2005.

APPEARANCES

Claimant appeared by his attorney, John C. Nodgaard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Nunc Pro Tunc Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injury? More particularly, is claimant entitled to a review and modification of the Agreed Award entered into between the parties on August 28, 2000?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Nunc Pro Tunc Award of the ALJ should be affirmed.

Claimant suffered accidental injury, in Docket No. 253, 915, on May 11, 1995, when a ladder collapsed and he fell, fracturing the heel of his left foot. Claimant initially had pain in his low back, but that pain eventually resolved.¹ Claimant later injured his back on June 11, 1998, and filed a claim against respondent as Docket No. 253,916. This record is somewhat confused as, at oral argument before the Board, two separate appeals were brought. This action, in Docket Nos. 253,915 and 253,916, stems from an appeal from the Nunc Pro Tunc Award of the ALJ, wherein the ALJ limited claimant to a 15 percent impairment to the left lower extremity for the May 11, 1995 injury. The review and modification requested a review of an Agreed Award entered into by the parties, wherein claimant was limited to a 15 percent impairment to the lower extremity even though a 7 percent impairment to the body for low back pain was contained in the record prior to the creation of the Agreed Award. Claimant contends he is entitled to review and modification, arguing that he is now entitled to the 7 percent permanent partial disability for the impairment to the back. Claimant's argument stems from the fact that respondent, after settling the matter for 15 percent to the lower extremity, then proceeded, in Docket No. 253,916, to argue that claimant had a 7 percent preexisting impairment to the back. Claimant argues that respondent's argument constitutes new evidence in Docket No. 253,915. The Board does not view respondent's argument as new evidence. But rather it is simply respondent's argument regarding the condition of claimant's low back from the June 11, 1998 accident.

The original Agreed Award included reports by Pedro A. Murati, M.D. (who limited claimant's injuries to the left ankle) and Timothy C. Fitzgibbons, M.D. (who rated claimant with a 15 percent impairment to the lower extremity on the left side, but also a 7 percent impairment to the body as a whole for his low back pain), which were introduced prior to the Agreed Award. The Board agrees with the ALJ that claimant has introduced no new evidence in this matter to show that claimant's condition has, in any way, changed or that the award is excessive or inadequate. The Board, therefore, adopts the findings and conclusions of the ALJ and affirms the Nunc Pro Tunc Award of Administrative Law Judge John D. Clark dated June 29, 2004.

¹ R.H. Trans. (Docket No. 253,916) at 15.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Nunc Pro Tunc Award of Administrative Law Judge John D. Clark dated June 29, 2004, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of July 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John C. Nodgaard, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director